Filed 8/7/19 Maroot v. Insulation Contracting and Supply CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TRISTAN MAROOT, Plaintiff and Respondent, v. INSULATION CONTRACTING AND SUPPLY, Defendant and Appellant.	F077556 (Super. Ct. No. 17CECG04211) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Monica R. Diaz, Judge.

Rajeev Sharma, in pro. per., for Defendant and Appellant.

Tristan Maroot, in pro. per., for Plaintiff and Respondent.

-ooOoo-

Defendant Insulation Contracting and Supply appeals from a judgment in favor of a former employee, contending the trial court should not have awarded a waiting time penalty under Labor Code section 203[1] or interest pursuant to section 98.1.

---

[*] Before Franson, Acting P.J., Smith, J. and DeSantos, J.

[1] Unlabeled statutory references are to the Labor Code.

We conclude an award of premium pay based on an employer's failure to provide statutorily required meal breaks in violation of section 226.7 cannot serve as the basis for the imposition of waiting time penalties under section 203. Therefore, based on the limited record available, we infer the trial court's award was based on a delayed delivery of the employee's final paycheck. An exhibit presented at trial shows the check was posted to the employer's account 10 calendar days after the employee quit his job. Therefore, we conclude the delay for which a waiting time penalty can be imposed is 10 days, not the 30 days awarded by the trial court. Accordingly, the waiting time penalty will be reduced from $2,760 to $920.

Similarly, premium pay based on a failure to provide meal breaks does not constitute "unpaid wages" for purposes of section 98.1, subdivision (c) and, therefore, cannot serve as the basis of an award of interest under that provision. Therefore, the award of interest in the amount of $150.07 must be vacated. We note, however, the employee is entitled to postjudgment interest calculated at 10 percent per year from the entry of the original judgment on April 11, 2018, until the payment of the judgment.

We therefore modify the judgment and affirm it as modified.

FACTS AND PROCEEDINGS

Plaintiff Tristan Maroot was employed by defendant Insulation Contracting and Supply (Employer) as a warehouse manager from September 16, 2014, through June 9, 2017, when he quit his job. Pursuant to an oral agreement, Maroot was paid $11.00 per hour through April 25, 2015 and thereafter at $11.50 per hour.

On June 16, 2017, Maroot filed an initial claim with the labor commissioner's office seeking premium pay for missed meal and rest breaks, interest under section 98.1, and waiting time penalties under section 203. On October 10, 2017, the matter was heard at the labor commissioner's office in Fresno. Maroot testified that he was unable to leave work for a meal period as someone always had to be in the office. Closing the warehouse for a meal period was never mentioned. Maroot also testified he was a smoker and did

receive some rest periods. Employer presented testimony that (1) someone had to be in the office at all times and (2) Maroot was never denied a meal period as he could take a lunch break at his desk.

On November 30, 2017, the labor commissioner issued a decision ordering Employer to pay Maroot (1) $8,177.50 in meal period premiums; (2) $371.91 in interest pursuant to section 98.1; and (3) $2,760 in waiting time penalties pursuant to section 203. The waiting time penalties equal $11.50 per hour times 8 hours per day times 30 days. The order stated Maroot was not prevented through coercion or encouragement from taking rest breaks and rejected his claim for premium pay based on missed rest breaks.

On December 12, 2017, Employer filed a notice of appeal of the labor commissioner's decision in the Fresno County Superior Court. On March 21, 2018, the court held a hearing at which the parties appeared representing themselves. Raul Sharma and Rajeev Sharma testified for Employer. Trial exhibit E, which is part of the appellate record, is a copy of (1) text messages about mailing Maroot's final paycheck and (2) bank records showing the check, dated June 12, 2017, was posted to Employer's account on June 19, 2017.

On April 11, 2018, the trial court filed a minute order that included a judgment for Maroot against Employer for "$3,148 in meal period premium;" "$2,760 in waiting time penalties pursuant to Labor Code section 203;" and "$150.07 in interest pursuant to Labor Code section 98.1."

In May 2018, Employer filed a notice of appeal from the judgment after court trial entered on April 11, 2018. Employer's notice designating record on appeal requested a reporter's transcript of the March 21, 2018, hearing. The minute order from that hearing stated "Not Recorded" in the space after "Reporter/Tape." In August 2018, a deputy clerk's declaration was filed in the superior court stating "it was determined that a court reporter was not present" on March 21, 2018, and, therefore, a reporter's transcript would not be included in the record. Employer's notice designating record on appeal requested

trial exhibit E be included in the clerk's transcript and did not request any other trial exhibits be included. Consequently, the timecards mentioned by the parties during oral argument before this court were not included in Employer's notice designating record on appeal. As a result, those documents are not part of the appellate record and we are unable to review them.

DISCUSSION

I. STANDARD OF REVIEW

An appeal to the superior court of an order, decision or award of the labor commissioner is unlike a typical judicial review of an administrative ruling. The appeal to the superior court nullifies the decision, and the court conducts a new trial of the dispute. (*Arias v. Kardoulias* (2012) 207 Cal.App.4th 1429, 1435; § 98.2, subd. (a).) The trial court hears the matter as a court of original jurisdiction with full power to consider and determine the claims as if they had never been before the labor commissioner. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1116–1117; § 98.2, subd. (a).) Accordingly, the hearing in the superior court is a new trial. (*Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 835–836.) In superior court proceedings, the decision of the labor commissioner is "entitled to no weight whatsoever, and the proceedings are truly 'a trial anew in the fullest sense.' " (*Sales Dimensions v. Superior Court* (1979) 90 Cal.App.3d 757, 763.)

The judgment entered by the superior court, in turn, is subject to a conventional appeal to the appropriate appellate court. (*Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal.App.4th 212, 219–220.) Accordingly, we review the trial court's decision on a challenge to a labor commissioner's award by examining whether the trial court's findings of fact are supported by substantial evidence and by conducting an independent review of the trial court's resolution of questions of law. (See *Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935–936.)

II. WAITING TIME PENALTIES UNDER SECTION 203

A. Claim of Error

In this appeal, Employer contends the trial court erred by awarding waiting time penalties and interest to Maroot. Employer contends it attempted to pay Maroot in a timely manner and when he did not show up to get his final paycheck, Employer mailed it to his home address as requested by Maroot. Alternatively, Employer argues that if it was responsible for the delay, the amount of the penalty should be reduced because the final paycheck cleared Employer's bank account on June 19, 2017. As Maroot was employed through June 9, 2017, the maximum length of the delay is 10 days and the award based on the maximum statutory period of 30 days was, in Employer's view, contrary to the terms of the Labor Code.

Based on Employer's arguments, we consider two theories for the trial court's award of waiting time penalties. First, the court may have based the award on the premium pay awarded as compensation for Employer's violation of section 226.7. Second, the court may have based the award on the late delivery of Maroot's final paycheck.

B. Premium Pay for Missed Meal Breaks

Section 203 authorizes an employee to recover penalties when the employer does not promptly pay the employee's final wages. Subdivision (a) of section 203 states:

> "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

The question of statutory interpretation presented by this appeal is whether the award relating to missed meal breaks constitutes "any wages" for purpose of subdivision (a) of section 203. We conclude it does not.

Section 226.7, subdivision (a) prohibits employers from requiring employees to work during the rest or meal periods required by the Industrial Welfare Commission (IWC). Section 11(A) of IWC Order 1-2001 addresses working conditions by providing that "no employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes."

"If an employer fails to provide an employee a meal … period in accordance with a state law, … the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." (§ 226.7, subd. (c).) Court's refer to this award as "premium pay." (E.g., *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040, fn. 19; *Furry v. East Bay Publishing, LLC* (2018) 30 Cal.App.5th 1072, 1082.)

In *Ling v. P.F. Chang's China Bistro, Inc.* (2016) 245 Cal.App.4th 1242, the Sixth District concluded that a section 203 waiting time claim could not be based on the premium pay awarded under section 226.7 for missed meal breaks. (*Id*. at p. 1261.) The court stated, "section 226.7 cannot support a section 203 penalty because section 203, subdivision (b) tethers the waiting time penalty to a separate action for wages" and a claim for premium pay under section 226.7 was not an action for *wages*. (*Ibid*.)

We adopt this interpretation of the statutes. Thus, waiting time penalties under section 203 cannot be based on an award of premium pay under section 226.7 for missed meal breaks. Based on this conclusion, the only potentially valid basis for the trial court's award of waiting time penalties under section 203 is the late delivery of Maroot's final paycheck.[2]

---

[2] It is undisputed that the final paycheck covered "wages" for purposes of section 203 and, therefore, late delivery of that check would be a valid ground for imposing waiting time penalties.

C. Late Payment of Final Wages

As background, we note that section 201 governs the payment of an employee's final wages when the employer discharges the employee. When, as here, an employee quits his or her job, section 202 applies. It provides that "his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit." (§ 202, subd. (a).) As to delivery of the payment, "an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting." (§ 202, subd. (a).)

1. Principles Governing How Error is Established

In an appeal, the appellate court is constitutionally required to presume the trial court's judgment is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To overcome this presumption, an appellant challenging a judgment must affirmatively demonstrate prejudicial error. (*Ibid*.) When an appellant contends a trial court's findings of fact are wrong, the appellant must demonstrate the record does not contain substantial evidence to support the particular finding being challenged. (*Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1658.) To demonstrate the absence of substantial evidence, the appellant must provide the appellate court with an adequate record of the evidence (including oral testimony) presented in the trial court. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 608–609 (*Jameson*); *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574 [absence of a reporter's transcript or settled statement meant plaintiff failed to provide an adequate record and, thus, failed to carry the burden of showing prejudicial error].) In *Estate of Fain* (1999) 75 Cal.App.4th 973, the Second District stated:

> "Where no reporter's transcript has been provided and no error is apparent on the face of the existing appellate record, the judgment must be *conclusively presumed correct* as to *all evidentiary matters*. To put it another way, it is presumed that the unreported trial testimony would

> demonstrate the absence of error. [Citation.] The effect of this rule is that an appellant who attacks a judgment but supplies no reporter's transcript will be precluded from raising an argument as to the sufficiency of the evidence." (*Id*. at p. 992; see *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187 [list of cases where absence of reporter's transcript precluded appellate court from reaching merits].)

Here, Employer was not able to include a reporter's transcript of the testimony presented during the court trial because there was no court reporter at the trial.

2. Impact of the Lack of a Reporter's Transcript

The claims of error raised by Employer are based on Employer's contentions as to what happened with the delivery of Maroot's final paycheck. The absence of a reporter's transcript or settled statement limits this court's ability to determine whether an alternate version of events is supported by the evidence. In *Jameson*, our Supreme Court stated the lack of a reporter's transcript "will frequently be fatal to a litigant's ability to have his or her claims of trial court error resolved on the merits by an appellate court." (*Jameson v. Desta*, *supra*, 5 Cal.5th at p. 608.) We note the court said "frequently," not "always." Consequently, in certain circumstances it is possible for an appellant to carry its burden of affirmatively establishing trial court error without a reporter's transcript. Here, we conclude the circumstances are such that Employer is able to establish its alternate theory of error, but is unable to establish the check was delivered or mailed within the 72-hour period allowed under section 202.

3. Employer's Version of the Facts

Employer addresses the delivery of Maroot's final paycheck by asserting the following facts. Maroot phoned the company accountant on Friday, June 9, 2017, to report he was quitting his job without giving a two-week notice. The accountant asked Maroot to come in that day to collect his final paycheck. Maroot said he would come in the following Monday (i.e., June 12, 2017), but did not show up. The accountant sent Maroot a text message asking Maroot if he could mail Maroot's check. Maroot responded with a text message stating: "Yes please mail it. I wont be able to go over

there." The text message also provided a mailing address in Fresno. The check was mailed that day and cleared Employer's bank account on June 19, 2017. Trial exhibit E was a bank record that included an image of the check, which was numbered 1435, dated June 12, 2017, and in the amount of $154.29. The check was posted to Employer's account on June 19, 2017.

4. Facts Established by the Record on Appeal

Under the applicable principles of appellate review, this court is unable to accept much of Employer's version of what happened with the delivery of the final paycheck. Without a reporter's transcript of Maroot's testimony at trial, we cannot accept (1) Maroot waited until Friday, June 9, 2017, to give notice or (2) Employer actually mailed the final paycheck on Monday, June 12, 2017. What the record does establish is that Maroot received his final wages no later than June 19, 2017, when the check was posted to Employer's bank account. Accordingly, we will adopt June 19, 2017, as the date Employer fulfilled its obligation under section 202, subdivision (a) to pay Maroot's final wages. That day is 10 days after the day identified in the labor commissioner's decision as the last day of Maroot's employment. The waiting time penalty under section 203 is calculated using *calendar* days. (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492.) In other words, waiting time "[p]enalties accrue not only on the days that the employee might have worked, but also on nonworkdays." (*Ibid.*) Based on the statutory text as interpreted in *Mamika*, we conclude the waiting time penalty under section 203 should be calculated using the 10-day period between June 9, 2017, and June 19, 2017, not the 30-day maximum adopted by the trial court.

5. Recalculation of the Waiting Time Penalty

The waiting time penalty for the 10-day period equals $11.50 per hour times 8 hours per day times 10 calendar days. This totals $920. Accordingly, we will modify the

judgment to reduce the award of $2,760 in waiting time penalties pursuant to section 203 to $920.

III. INTEREST

A. Section 98.1

In Item 3 of the judgment, the trial court awarded "$150.07 in interest pursuant to Labor Code section 98.1." Subdivision (c) of section 98.1 states: "All awards granted pursuant to a hearing under this chapter shall accrue interest on all *due and unpaid wages* at the [legal] rate." (Italics added.)

Premium pay for missed meal periods does not qualify as "unpaid wages" for purposes of section 98.1. (See *Culley v. Lincare Inc.* (E.D.Cal. 2017) 236 F.Supp.3d 1184, 1196.) In *Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244 (*Kirby*), the court considered "whether a section 226.7 claim, which concerns an employer's alleged failure to provide statutorily mandated meal and rest periods, constitutes an 'action brought for the nonpayment of wages' within the meaning of section 218.5," a provision that authorizes the recovery of attorney fees. (*Id.* at p. 1255.) The court concluded it did not, stating section 226.7 "is not aimed at protecting or providing employees' *wages*" and a claim under that section is "not for the 'nonpayment of *wages*.'" (*Kirby, supra,* at p. 1255, italics added.)

We adopt the same interpretation for the term "unpaid wages" used in section 98.1, subdivision (c) and conclude the award of premium pay to Maroot under section 226.7 did not constitute an award of unpaid wages. Therefore, an award of waiting time penalties is not an award of "unpaid wages" for purposes of section 98.1, subdivision (c) and statutory prejudgment interest does not accrue on the award of premium pay. Consequently, we conclude the award of "$150.07 in interest pursuant to Labor Code section 98.1" was inappropriate and the judgment should be modified to eliminate that award of prejudgment interest.

B. Postjudgment Interest

1. Applicable Law

Under California law, "a judgment bears interest at the legal rate from its date of entry by force of law, regardless of whether [the judgment] contains a declaration to that effect." (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 326, p. 932.)

The Legislature has set the legal rate of interest at 10 percent per year. (Code Civ. Proc., § 685.010, subd. (a).) Interest accrues on the principal amount of the money judgment remaining unsatisfied. (*Ibid*.) Postjudgment interest is calculated as simple interest and, therefore, is not compounded. (*Westbrook v. Fairchild* (1992) 7 Cal.App.4th 889, 893 ["Constitution and statutes limit postjudgment interest to 10 percent simple interest"].)

"When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment." (*Stockton Theatres, Inc. v. Palermo* (1961) 55 Cal.2d 439, 442.)

2. Accrual on Modified Judgment

Under the foregoing rules of law, Maroot is entitled to postjudgment interest at the rate of 10 percent per year on the principal amount of the modified judgment from April 11, 2018, which is the date the original judgment was entered. The principal amount of the modified judgment totals $4,068, which equals $3,148 in premium pay for meal breaks plus $920 in waiting time penalties under section 203. From April 11, 2018, until oral argument on August 1, 2019 (a period of 477 days), the principal amount accrued $531.63 in postjudgment interest. The amount of postjudgment interest accruing each day after August 1, 2019, is approximately $1.11. This daily amount of postjudgment interest is the product of $4,068 times 10 percent divided by 365 days. We provide these calculations in an effort to avoid additional disputes between the parties as to the amount Employer must pay to satisfy the judgment.

DISPOSITION

Item 1 of the judgment, which provides "$3,148 in meal period premium" is affirmed. The amount in Item 2 of the judgment is modified to provide "$920 in waiting time penalties pursuant to Labor Code section 203." The award of "$150.07 in interest pursuant to Labor Code section 98.1" in Item 3 of the judgment is replaced with the following: "The principal amount of this judgment ($4,068) shall bear interest at the rate of 10 percent per year from April 11, 2018, until paid." As modified, the judgment is affirmed.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)